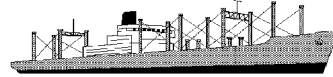




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ORAL v WRITTEN CONTRACT, IMPLIED TERMS, GOOD FAITH DEALING, AND EMPLOYMENT

It is a commonly heard phrase – "Get it in writing." That is a prudent practice to follow. An oral contract (i.e. not in writing) is just as enforceable as a written contract, but the problem is that you need to prove the existence and terms of the oral contract. So yes, you want to get it in writing and save yourself anxiety and \$\$ in legal costs down the road.

So now you have your contract (or agreement, same difference) in writing. But just like there are hidden images on the computer in front of you, there are hidden terms to the agreement. The difference is that you can't click on the agreement, written or oral, to reveal those terms.

Contracts entered into in Oregon have implied terms. One of those implied terms is the implied covenant of good faith and fair dealing. One aspect of this covenant is that when you enter into a contract, you can't turn around and try to sabotage it. A person is prohibited from taking action which would result in destroying or injuring the other person's right to receive the fruits (benefits) of the contract.

The court will look at the conduct of the person in light of what is the reasonable expectation of the parties. The expectation must be objectively reasonable, and the court will look at the written terms of the contract in making that decision.

The Ninth Circuit Court of Appeals in San Francisco, which hears federal appeals in the western states, recently decided an aviation case involving this covenant. The

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airline, which was being sued by a passenger, argued that federal law preempted state common law claims, including the covenant of implied good faith and fair dealing.

Let's stop there and hold that thought – the airline was saying that those terms were absent from the contract which involved a frequent flyer program offered by the airline. That argument does not resonate well. Imagine that you are standing in front of a judge and claim that you don't have to deal fairly and in good faith with your customers. That's not going to score many points.

The airline argued that federal law preempted all state common law claims, such as this implied term. The Ninth Circuit said not so fast and rejected that argument, stating that the federal statute governing transportation by air could co-exist with state common law claims, thank you very much.

So there's a little federal transportation law lesson thrown in, which is that while federal transportation law generally supplants state law, it is not without its limits. In this case the federal law itself stated that some state laws could co-exist, thus greasing the road for the state law to apply.

Anyway, as for the implied good faith covenant discussed above, it likewise has its limits. For example, it does not apply to at-will employment agreements, which is the usual type of agreement in an employment setting. At-will employees, i.e. employees without

written employment agreements (remember, get it in writing) can be terminated for good reasons, bad reasons, or for no reason at all. The employer can be completely unfair and unreasonable.

Of course, an employee cannot be let go for an illegal reason, e.g. gender or race reasons. But most employers, even the i.q. challenged kind, won't give that as a reason for termination.

Likewise, along the same thought process, the implied good faith and fair dealing doctrine does not apply to an employer's modification of the terms of an agreement regarding an at-will employee. After, if the employer can terminate without good reason, the employer can likewise modify the agreement without good reason.

And just what is good faith, and what is bad faith? To state it simply, one way of looking at it is that honesty qualifies as good faith, while dishonesty involves bad faith. Whereas the issue of the reasonable expectations of the parties is determined on an objective basis, whether bad faith is present can be determined on a subjective basis. The court can inquire as to the motivations of the parties in determining whether bad faith is present.

In closing, contracts require both sides to act in good faith. The terms of the agreement will be determined objectively, while the behavior may be determined subjectively. But for at-will employment, your employer can let you go, or change contract terms, for practically no reason.

That's it for now. Until next time, keep the cargo rollin'!

The Obligatory Disclaimer
This newsletter is for informational purposes, does not provide legal advice and does not create an attorney-client relationship.

Short Bio
Admitted to the state bars of Oregon, Alaska and Florida. Practicing law for over 30 years and emphasizing transportation law, business law and related matters and litigation